Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

EDDIE GILMER,
Petitioner

V.

STATE OF MISSISSIPPI,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF
MISSISSIPPI

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE MAJORITY OPINION OF THE MISSISSIPPI SUPREME COURT VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS BY MAKING IT A FELONY TO VIDEOTAPE A PERSON IN HER HOME EVEN THOUGH THAT PERSON CAN BE VIEWED BY THE PUBLIC THROUGH AN OPEN DOOR.

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OPINIONS BELOW

On August 20, 2004, Eddie Gilmer was convicted by a jury in the Circuit Court of Madison County, Mississippi of five counts of video voyeurism and was sentenced to a term of five years consecutively on each count, with ten years suspended and fifteen to serve. Gilmer appealed his convictions to the Mississippi Supreme Court. That Court affirmed Gilmer's conviction. *State v. Gilmer*, 955 So.2d 829 (Miss. 2007). Appendix A.

JURISDICTION

This Court has jurisdiction under Title 28 *U.S.C.* §1257, which provides that this Court may grant a petition for writ of certiorari by any party where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., Amendment XIV (in part):

> [N]or shall any State deprive any person of

> life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Miss. Code Ann. §97-29-63 (Rev. 2006):

> Any person who with lewd, licentious or indecent intent secretly photographs, films, videotapes, records or otherwise reproduces the image of another person without the permission of such person when such a person is located in a place where a person would intend to be in a state of undress and have a reasonable expectation of privacy, including, but not limited to, private dwellings or any facility, public or private, used as a restroom, bathroom, shower room, tanning booth, locker room, fitting room, dressing room or bedroom shall be guilty of a felony and upon conviction shall be punished by a fine of Five Thousand Dollars ($5,000.00) or by imprisonment of not more than

STATEMENT OF THE CASE

(a) Course of the Proceedings and Disposition in the Courts Below:

On August 20, 2004, Eddie Gilmer was convicted by a jury in the Circuit Court of Madison County, Mississippi of five counts of video voyeurism and was sentenced to a term of five years consecutively on each count, with ten years suspended and fifteen to serve. Gilmer appealed his convictions to the Mississippi Supreme Court. That Court affirmed Gilmer's conviction. *State v. Gilmer,* 955 So.2d 829 (Miss. 2007). Appendix A. He did not file a motion for rehearing in state court. A copy of the state court judgment is

attached as Appendix B.

(b) Statement of Facts:

Eddie Gilmer was an elected constable in Madison County at the time of his alleged criminal behavior. He served warrants in Madison County, including at the Pear Orchard Apartments in Ridgeland, Mississippi, where Debra Clayton occupied a second-floor apartment. In March 2003, Clayton noticed that Gilmer would arrive at the Pear Orchard Apartments in his official vehicle marked "Madison County Constable, District Number 3, Eddie Gilmer" around 9:00 p.m. and park his car in a space in the apartment complex parking lot with his vehicle facing Clayton's apartment about 87 feet from her balcony. Gilmer would stay in his parked car for an hour or an hour and a half before driving away.

Clayton contacted the police about Gilmer's suspicious behavior. Consequently, police officers conducted five separate surveillance operations. Officers captured Gilmer on tape, recording Clayton with a hand-held video camera while she was sitting inside her apartment in front of her balcony door, which was open about eighteen inches. The evidence demonstrated that, while filming, Gilmer often zoomed in on Clayton's chest and crotch area.

Gilmer was indicted on May 23, 2003, charged with ten counts of photographing a person in privacy without permission. A jury trial culminated in a conviction on counts five through ten (the counts where Gilmer was under video surveillance by the police), but was acquitted on the first five counts occurring before Clayton notified the police.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE MAJORITY OPINION OF THE MISSISSIPPI SUPREME COURT VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS BY

MAKING IT A FELONY TO VIDEOTAPE A PERSON IN HER HOME EVEN THOUGH THAT PERSON CAN BE SEEN BY THE PUBLIC THROUGH AN OPEN DOOR.[1]

As the Mississippi Supreme Court recently noted, "[i]t is bedrock law in Mississippi that criminal statutes are to be strictly construed against the State and liberally in favor of the accused." *Coleman v. State*, 947 So. 2d 878, 881 (Miss. 2006) (citing *McLamb v. State*, 456 So.2d 743, 745 (Miss. 1984)). Not only is this principle firmly embedded in Mississippi law, Chief Justice John Marshall wrote that this ancient rule of statutory interpretation "is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." *U.S. v. Wiltberger*, 18 U.S. 76, 95, 5 L. Ed. 37, 42, 5 Wheat. 76 (1820).

Judicial constructions not construing statutes in favor of the offender violate fundamental principles of due process. *Duke v. U. of Tex.*, 663 F.2d 522, 526 (5th Cir. 1981), 527 (citing *Dunn v. U.S.*, 442 U.S. 100, 112, 99 S. Ct. 2190, 2197, 60 L. Ed. 2d 743 (1979); *Marks v. U.S.*, 430 U.S. 188, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977); *Rabe v. Washington*, 405 U.S. 313, 92 S. Ct. 993, 31 L. Ed. 2d 258 (1972); *Bouie v. City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964)).

In construing statutes in favor of the offender, any "[a]mbiguities concerning the ambit of criminal statutes should be resolved in favor of lenity." *Id.* (citing *Busic v. U.S.*, 446 U.S. 398, 406, 100 S. Ct. 1747, 1753, 64 L. Ed. 2d 381 (1980); *Dunn*, 442 U.S. at 112; *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 375, 93 S. Ct. 1652, 1663, 36 L. Ed. 2d 318 (1973); *U.S. v. Campos-Serrano*, 404 U.S. 293, 297, 92 S. Ct. 471, 474, 30 L. Ed. 2d 457 (1971);

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[1] Gilmer's arguments track those of the dissents of Justices Diaz and Dickerson of the Mississippi Supreme Court.

McBoyle v. U.S., 283 U.S. 25, 27, 51 S. Ct. 340, 341, 75 L. Ed. 816 (1931); *U.S. v. Scrimgeour*, 636 F.2d 1019, 1022 (5th Cir. 1981); *Tenneco Oil Co. v. Padre Drilling Co.*, 453 S.W.2d 814 (Tex.1970)).

Accordingly, due process requires the State to prove the following elements in this case: (1) "lewd, record[ing] or otherwise reproduc[ing] the image of another person;" (3) without their permission; (4) when the other person "is located in a place *where a person would intend to be in a state of undress*;" and (5) *where that person would "have a reasonable expectation of privacy*." Miss Code Ann. §97-29-63 (Rev. 2006) (emphasis supplied). However, under the majority's interpretation, the State is able to meet the fourth and fifth elements merely by proving the person was located in a private dwelling. This is a clear violation of the rules of statutory construction, and results in a violation of due process. *Duke v. U. of Tex.*, 663 F.2d at 526.

The majority opinion neither addresses the age-old rule of construction regarding criminal statutes nor does it explain how its interpretation of the statute does not violate due process. Instead, the opinion relies on *Davis v. Miller*, 202 Miss. 880, 890, 32 So.2d 871, 873 (Miss. 1947) in support of its liberal interpretation in favor of the state. *Davis* held that courts may not construe a statute so that a portion of it becomes meaningless. *Id.* (citing 50 Am. Jur., Statutes, Sec. 358, 361-64). This proposition, however, actually undermines the majority's conclusion, for under its interpretation, the statute's requirements of undress and reasonable expectation of privacy become meaningless. *Id.*

The State presented no evidence that Clayton was "located in a place where a person would intend to be in a state of undress." This element cannot be met by the mere fact that she was inside her apartment. At all times, Clayton was fully clothed, seated in front of an open door and facing a public parking lot. Consistent with her testimony, no

reasonable person would have a reasonable expectation of privacy or intend to be in a state of undress while sitting in front of an open door. Clayton repeatedly testified that she never intended to be undressed with the blinds or door open:

> Q: At anytime when the defendant was present, were you disrobed?
>
> Q: Were there occasions, however, in your home when you were disrobed? A: As long as my window was shut and my blinds were pulled. . .
>
> Q: Would it be fair to say that you generally don't intend to be in a state of undress in your living room or den in front of a plate glass window with it open, do you? A: Not open. Q: Or with the blinds open. Would you agree with that? A: Yes, I would.

Not only does the majority's broad interpretation of the crime violate due process concerns regarding the rules of statutory construction and due process, it has alarming First Amendment ramifications because of its chilling effect on anyone legitimately using a video camera or any other recording device. This law was passed to protect persons from intrusive and invasive private recording—a "Peeping Tom" law for this ever-more digital world.

Yet under the majority's interpretation of the statute, virtually any use of a recording device could prove to be a felony. A statute is overbroad when it in sweeps within its ambit expression which in ordinary circumstances would constitute an exercise of freedom of speech or the press or where it lends itself to harsh and discriminatory enforcement. *Thornhill v. Alabama,* 310 U.S. 88 (1940). As the minority opinion in *Gilmer's case* points out, under the majority's rationale, many persons who utilize recording devices in otherwise legal employment could be prosecuted as felons. For example, a television reporter who covers a sporting match and conducts interviews in the team's locker room might be said to have "lewd intent" if his camera accidentally zooms in or records a sensitive area of a

person's body. Beware also to the private investigator who is paid by a spouse to record the night-time activities of a straying mate. *Gilmer*, 855 So2d at 842 (Diaz, J., dissenting). Is someone whose camera through an open window or door unexpectedly witnesses an adult sexually abusing a child and films it for later evidentiary use guilty of a criminal act?

The majority's elimination of two critical elements from the crime of video voyeurism distorts legislative intent and violates First Amendment doctrines against overbreadth constructions of criminal laws and centuries-old, fundamental principles of due process. Because the state has failed to prove two essential elements of the offense and has violated both the First and Fourteenth Amendments, the Court should grant certiorari.

To be clear, Gilmer did not video someone who believed she was enjoying a moment of privacy where she could not be seen or filmed. Gilmer is charged with video taping Clayton at a time when she was fully clothed and sitting in a place where she freely admits that people outside in the parking lot could see her. Voyeurism is not taking pictures of a person who is aware that the public may be looking. It is nonsensical for the law to allow one to stand and look with impunity at a person who knows they are being looked at, but the moment a picture is taken or a video is made, the looker becomes a voyeur who is guilty of a felony.

Debra Clayton freely admits she was aware that anyone in the parking lot of her apartment complex could easily see her while she was sitting in front of her balcony door. Thus, under the majority view, Gilmer could not take a picture of Clayton without becoming a felon even though Clayton knew that he or anyone else could see her from the parking lot and might be filming her.[2] Under its plain terms,

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[2] On the five counts where Gilmer was convicted, Clayton in fact knew she was being filmed and consented to having the police film Gilmer

the statute is violated only when the person photographed is in a place where that person would expect to be undressed and would have a reasonable expectation of privacy. Clayton had no reasonable expectation of privacy to that which she knowingly exposed to the public. *Rakas v. Illinois*, 439 U.S. 128, 143 (1978).

CONCLUSION

Because the ruling of the Mississippi Supreme Court violates due process and has a chilling effect on legitimate First Amendment expression, this Court should grant certiorari.

Respectfully submitted,
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filming her.

APPENDIX A

Supreme Court of Mississippi.
Eddie GILMER
v.
STATE of Mississippi.
No. 2004-KA-02236-SCT.

May 10, 2007.

Background: Defendant was convicted by jury in the Circuit Court, Madison County, Samac S. Richardson, J., of five counts of photographing, taping, or filming a person in violation of expectation of privacy, under "video voyeur" statute, and he appealed.

Holdings: The Supreme Court, Smith, C.J., held that:

(1) in a matter of first impression, sufficient evidence supported conclusion that defendant "secretly" recorded victim;

(2) there was sufficient evidence that defendant's recording of victim took place "where a person would intend to be in a state of undress and have a reasonable expectation of privacy";

(3) indictment was not insufficient; and

(4) "video voyeur" statute was not unconstitutionally overbroad.

Affirmed.

Diaz, P.J., dissented, with opinion, in which Graves and Dickinson, JJ., joined.

Dickinson, J., dissented, with opinion, in which Diaz, P.J., and Graves, J., joined.

West Headnotes

[1] Criminal Law 110 1139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110k1139 k. Additional Proofs and Trial De Novo. Most Cited Cases
Supreme Court reviews whether trial court erred in denying a motion for directed verdict under a de novo standard of review.

[2] Criminal Law 110 753.2(3.1)

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k753 Direction of Verdict
110k753.2 Of Acquittal
110k753.2(3) Insufficiency of Evidence
110k753.2(3.1) k. In General. Most Cited Cases

Criminal Law 110 977(4)

110 Criminal Law
110XXIII Judgment
110k977 Judgment in General
110k977(4) k. Judgment Notwithstanding the Verdict. Most Cited Cases
In considering whether the evidence is sufficient to sustain a conviction in the face of a motion for directed verdict or for judgment notwithstanding the verdict (JNOV), the critical

inquiry is whether the evidence shows beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; where the evidence fails to meet this test it is insufficient to support a conviction.

[3] Criminal Law 110 1139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110k1139 k. Additional Proofs and Trial De Novo. Most Cited Cases
When considering a trial court's denial of a motion for judgment notwithstanding the verdict (JNOV), the standard of review is de novo.

[4] Criminal Law 110 977(4)

110 Criminal Law
110XXIII Judgment
110k977 Judgment in General
110k977(4) k. Judgment Notwithstanding the Verdict. Most Cited Cases
Trial court, in ruling on a motion for judgment notwithstanding the verdict (JNOV), must view the evidence in the light most favorable to the non-moving party and look only to the sufficiency, and not the weight of the evidence.

[5] Criminal Law 110 1156(2)

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1156 New Trial
110k1156(2) k. Sufficiency of Evidence. Most Cited Cases

When evaluating the denial of a motion for new trial, Supreme Court will overturn the trial court only if it abused its discretion in that it denied a new trial though the verdict was against the overwhelming weight of the evidence.

[6] Criminal Law 110 549

110 Criminal Law
110XVII Evidence
110XVII(V) Weight and Sufficiency
110k549 k. Weight and Conclusiveness in General. Most Cited Cases

Criminal Law 110 562

110 Criminal Law
110XVII Evidence
110XVII(V) Weight and Sufficiency
110k562 k. Sufficiency to Support Conviction in General. Most Cited Cases
Weight and the sufficiency of the evidence are not synonymous.

[7] Criminal Law 110 562

110 Criminal Law
110XVII Evidence
110XVII(V) Weight and Sufficiency
110k562 k. Sufficiency to Support Conviction in General. Most Cited Cases
When determining whether the evidence was sufficient, the critical inquiry is whether the evidence is of such quality that reasonable and fairminded jurors in the exercise of fair and impartial judgment might reach different conclusions.

[8] Criminal Law 110 935(1)

110 Criminal Law
110XXI Motions for New Trial
110k935 Verdict Contrary to Evidence
110k935(1) k. Weight and Sufficiency of Evidence in General. Most Cited Cases
When determining whether the verdict was against the overwhelming weight of the evidence, Supreme Court will not order a new trial unless it is convinced that the verdict was contrary to the substantial weight of the evidence so that justice requires that a new trial be granted.

[9] Criminal Law 110 1139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110k1139 k. Additional Proofs and Trial De Novo. Most Cited Cases
Interpretation of a statute is reviewed de novo by Supreme Court.

[10] Statutes 361 190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases
First question in interpreting a statute is whether the statute is ambiguous.

[11] Statutes 361 188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction

361k187 Meaning of Language
361k188 k. In General. Most Cited Cases
When a statute is unambiguous, Supreme Court applies the plain meaning of the statute and refrains from the use of statutory construction principals.

[12] Statutes 361 190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases
The court may not enlarge or restrict a statute where the meaning of the statute is clear.

[13] Statutes 361 181(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In General. Most Cited Cases
In interpreting statutes, Supreme Court's primary objective is to employ that interpretation which best suits the legislature's true intent or meaning.

[14] Disorderly Conduct 129 1

129 Disorderly Conduct
129k1 k. Nature and Elements of Offenses. Most Cited Cases
"Video voyeur" statute, which criminalizes photographing, taping, or filming a person in violation of expectation of privacy, sets forth four elements: (1) lewd, licentious or

indecent intent, (2) an act, i.e., secretly photographing, filming, videotaping, recording or otherwise, (3) lack of consent, i.e., without victim's permission, and (4) a protected location. West's A.M.C. § 97-29-63.

[15] Disorderly Conduct 129 9

129 Disorderly Conduct
129k9 k. Evidence. Most Cited Cases
Sufficient evidence supported conclusion that defendant "secretly" recorded victim, which was necessary element to establish offense of photographing, taping, or filming a person in violation of expectation of privacy, though victim was aware that defendant was recording her; defendant, while sitting inside his dark vehicle at night outside victim's apartment building, about 87 feet from apartment, used hand-held video camera, including its zoom feature, to make close-up recordings of victim, and there were two sets of binoculars in vehicle, all of which indicated an attempt by defendant to conceal his actions and elude detection. West's A.M.C. § 97-29-63.

[16] Disorderly Conduct 129 9

129 Disorderly Conduct
129k9 k. Evidence. Most Cited Cases
There was sufficient evidence that defendant's recording of victim took place "where a person would intend to be in a state of undress and have a reasonable expectation of privacy," which was element of offense of photographing, taping, or filming a person in violation of expectation of privacy, as defendant sat in his vehicle and recorded victim with hand-held video camera while victim was in her apartment, i.e., a private dwelling, which was one of the places listed in statute as meeting the location element. West's A.M.C. § 97-29-63.

[17] Statutes 361 206

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k206 k. Giving Effect to Entire Statute. Most Cited Cases
Court is obliged, whenever reasonable, to reach an interpretation of a statute which gives effect to all the statutory language.

[18] Disorderly Conduct 129 1

129 Disorderly Conduct
129k1 k. Nature and Elements of Offenses. Most Cited Cases
For purposes of statute criminalizing offense of photographing, taping, or filming a person in violation of expectation of privacy, when prohibited recording happens in location listed in statute, state need not prove at trial, and appellate court need not analyze on appeal, whether these places are "where a person would intend to be in a state of undress and have a reasonable expectation of privacy," as these places are locations deemed as a matter of law to satisfy such qualifications; however, when prohibited recording occurs in location other than one of those listed in statute, state must show at trial and appellate court must determine on appeal whether location was one where person would intend to be in state of undress and have reasonable expectation of privacy. West's A.M.C. § 97-29-63.

[19] Statutes 361 176

361 Statutes
361VI Construction and Operation

361VI(A) General Rules of Construction
361k176 k. Judicial Authority and Duty. Most Cited Cases
Supreme Court takes seriously its responsibility to neither enlarge nor restrict a statute.

[20] Criminal Law 110 1139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110k1139 k. Additional Proofs and Trial De Novo. Most Cited Cases
The question of whether an indictment is fatally defective is an issue of law, subject to de novo review by Supreme Court.

[21] Indictment and Information 210 60

210 Indictment and Information
210V Requisites and Sufficiency of Accusation
210k58 Subject-Matter of Allegations
210k60 k. Elements and Incidents of Offense in General. Most Cited Cases

Indictment and Information 210 71.2(2)

210 Indictment and Information
210V Requisites and Sufficiency of Accusation
210k71 Certainty and Particularity
210k71.2 Purpose of Requirement and Test of Compliance
210k71.2(2) k. Informing Accused of Nature of Charge. Most Cited Cases

Indictment and Information 210 71.2(4)

210 Indictment and Information

210V Requisites and Sufficiency of Accusation
210k71 Certainty and Particularity
210k71.2 Purpose of Requirement and Test of Compliance
210k71.2(4) k. Protection Against Subsequent Prosecution. Most Cited Cases
An indictment must contain (1) the essential elements of the offense charged, (2) sufficient facts to fairly inform defendant of the charge against which he must defend, and (3) sufficient facts to enable him to plead double jeopardy in the event of a future prosecution for the same offense. U.S.C.A. Const.Amend. 5.

[22] Disorderly Conduct 129 7

129 Disorderly Conduct
129k6 Indictment or Information
129k7 k. Requisites and Sufficiency. Most Cited Cases
Indictment charging defendant with photographing, taping, or filming a person in violation of expectation of privacy, which alleged that defendant recorded victim while she "was inside of her apartment having a reasonable expectation of privacy," was not rendered incomplete for failing to also state "when such a person is located in a place where a person would intend to be in a state of undress," as statute setting forth offense defined a private dwelling place as a place where a person would intend to be in a state of undress, and the victim being "inside her apartment" was equivalent to her being inside her private dwelling. West's A.M.C. § 97-29-63.

[23] Criminal Law 110 1139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110k1139 k. Additional Proofs and Trial De Novo.

Most Cited Cases
Supreme Court reviews the constitutionality of statutes de novo.

[24] Criminal Law 110 1130(5)

110 Criminal Law
110XXIV Review
110XXIV(I) Briefs
110k1130 In General
110k1130(5) k. Points and Authorities. Most Cited Cases
Issue of whether "video voyeur" statute, which criminalizes photographing, taping, or filming a person in violation of expectation of privacy, was unconstitutionally vague was procedurally barred, in prosecution of defendant pursuant to the statute, as defendant neither addressed nor briefed vagueness. West's A.M.C. § 97-29-63.

[25] Constitutional Law 92 1145(1)

92 Constitutional Law
92IX Overbreadth in General
92k1143 Particular Issues and Applications
92k1145 Sex
92k1145(1) k. In General. Most Cited Cases

Disorderly Conduct 129 1

129 Disorderly Conduct
129k1 k. Nature and Elements of Offenses. Most Cited Cases
"Video voyeur" statute, which criminalizes photographing, taping, or filming a person in violation of expectation of privacy, was not unconstitutionally overbroad; lewd-intent element of statute prevented overbroad reach to legitimate recording of persons for legitimate purposes, and, beyond

simple act of recording a person without his consent, state had to prove that defendant recorded victim with a lewd intent and that defendant did so in a place which constituted a protected location pursuant to the statute. West's A.M.C. § 97-29-63.
West CodenotesRecognized as UnconstitutionalW.S.A. 944.205(2)(a)

***831** Julie Ann Epps, Michael V. Ward, Canton, attorneys for appellant.
***832** Office of the Attorney General by Jacob RayW. Daniel Hinchcliff, attorneys for appellee.

EN BANC.SMITH, Chief Justice, for the Court.

STATEMENT OF THE CASE

¶ 1. This case comes to the Court on first impression as to whether the evidence was sufficient to support a conviction under the "video voyeur" statute, Miss.Code Ann. § 97-29-63 (Rev.2006). Finding that the evidence provided satisfied the statute, we affirm the defendant's conviction.

FACTS AND PROCEDURAL HISTORY

¶ 2. Eddie Gilmer was an elected constable in Madison County at the time of his alleged criminal behavior. He served warrants in Madison County, including at the Pear Orchard Apartments in Ridgeland, Mississippi, where Debra Clayton occupied a second-floor apartment. In March 2003, Clayton noticed that Gilmer would arrive at the Pear Orchard Apartments in his official vehicle marked "Madison County Constable, District Number 3, Eddie Gilmer" around 9:00 p.m. and park his car in a space in the apartment complex parking lot with his vehicle facing Clayton's apartment about 87 feet from her balcony. Gilmer would stay in his parked car for an hour or an hour and a half before driving away.

¶ 3. Clayton contacted the police about Gilmer's suspicious behavior. Consequently, police officers conducted five separate surveillance operations. Officers captured Gilmer on tape, recording Clayton with a hand-held video camera while she was sitting inside her apartment in front of her balcony door, which was open about eighteen inches. The evidence demonstrated that, while filming, Gilmer often zoomed in on Clayton's chest and crotch area. Gilmer was indicted on May 23, 2003, charged with ten counts of photographing a person in privacy without permission. A jury trial culminated in a conviction on counts six through ten, and, on August 20, 2004, for each count the trial court sentenced Gilmer to serve a term of five years, each to run consecutively, in the custody of the Mississippi Department of Corrections. The judge suspended the sentences for two counts, resulting in a sentence of fifteen years in prison and five years of supervised probation upon release.

¶ 4. Gilmer filed a Motion for New Trial and/or Judgment of Acquittal Notwithstanding the Verdict (JNOV) on August 23, 2004. The trial court denied Gilmer's motion, and Gilmer timely filed an appeal to this Court seeking reversal of that denial as well as of the jury verdict of guilty. Gilmer raises five errors on appeal:

I. The Trial Court Erred in Overruling Gilmer's Motions for Directed Verdict as Well as His Post-trial Motions for JNOV and New Trial Due to the Insufficiency of the Evidence.

II. The Trial Court Committed Reversible Error in Overruling Gilmer's Motion to Quash the Indictment for Failure to State an Essential Element of the Offense.

III. The Statute Is Unconstitutionally Vague and Overbroad on its Face and as Applied to Gilmer.

IV. The Trial Court Erred in Overruling Gilmer's Objection to the Instructions Which Failed to Require

That the Jury Find That Clayton Was in a Place Where a Person Would Intend to Be in a State of Undress and Have a Reasonable Expectation of Privacy.
***833 V. This Court Should Reverse Gilmer's Conviction Because the Jury Was Not Told That it Had to Find That Clayton's Expectation of Privacy, If Any, Had to Be Reasonable under the Circumstances.**

DISCUSSION

I. Whether the Trial Court Erred in Overruling Gilmer's Motions for Directed Verdict as Well as His Post-trial Motions for JNOV and New Trial Due to the Insufficiency of the Evidence.

[1][2] ¶ 5. This Court reviews whether the Court erred in denying a motion for directed verdict under a de novo standard of review. *White v. Stewman,* 932 So.2d 27, 32 (Miss.2006). "[I]n considering whether the evidence is sufficient to sustain a conviction in the face of a motion for directed verdict or for judgment notwithstanding the verdict, the critical inquiry is whether the evidence shows 'beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction.' " *Ivy v. State,* 949 So.2d 748, at *9 (Miss.2007) (citing *Carr v. State,* 208 So.2d 886, 889 (Miss.1968)).

[3][4][5] ¶ 6. When considering a trial court's denial of a motion for judgment notwithstanding the verdict, the standard of review is de novo. *Poole v. Avara,* 908 So.2d 716, 726 (Miss.2005). The trial court must view the evidence in the light most favorable to the non-moving party and look only to the sufficiency, and not the weight of the evidence. *Id.* When evaluating the denial of a motion for new trial, this Court will overturn the trial court only if it abused its

discretion in that it denied a new trial though the verdict was against the overwhelming weight of the evidence. *Id.* at 727.

[6][7][8] ¶ 7. The weight and the sufficiency of the evidence are not synonymous. *Id.* at 726. When determining whether the evidence was sufficient, the critical inquiry is whether the evidence is of such quality that reasonable and fairminded jurors in the exercise of fair and impartial judgment might reach different conclusions. *Id.* When determining whether the verdict was against the overwhelming weight of the evidence, we will not order a new trial unless we are convinced that the verdict was contrary to the substantial weight of the evidence so that justice requires that a new trial be granted. *Id.* at 727.

¶ 8. Gilmer places in dispute for the first time the interpretation of Miss.Code Ann. § 97-29-63, the statute under which he was convicted, asserting that according to the plain language of the statute, the evidence was insufficient to prove two of the elements of the statutory crime.

[9][10][11][12][13] ¶ 9. The interpretation of a statute is reviewed de novo by this Court. *McLamb v. State*, 456 So.2d 743, 745 (Miss.1984). The first question in interpreting a statute is whether the statute is ambiguous. *Harrison v. State*, 800 So.2d 1134, 1137 (Miss.2001). When a statute is unambiguous, this Court applies the plain meaning of the statute and refrains from the use of statutory construction principals. *Pinkton v. State*, 481 So.2d 306, 309 (Miss.1985). The court may not enlarge or restrict a statute where the meaning of the statute is clear. *State v. Traylor*, 100 Miss. 544, 558-59, 56 So. 521, 523 (1911). In interpreting statutes, this Court's primary objective is to employ that interpretation which best suits the legislature's true intent or meaning. *Clark v. State ex. rel Mississippi State Med. Ass'n*, 381 So.2d 1046, 1048 (Miss.1980).

*834 ¶ 10. Miss.Code Ann. § 97-29-63 (Rev.2006) reads: Any person who with lewd, licentious or indecent intent secretly photographs, films, videotapes, records or otherwise reproduces the image of another person without the permission of such person when such a person is located in a place where a person would intend to be in a state of undress and have a reasonable expectation of privacy, including, but not limited to, private dwellings or any facility, public or private, used as a restroom, bathroom, shower room, tanning booth, locker room, fitting room, dressing room or bedroom shall be guilty of a felony and upon conviction shall be punished by a fine of Five Thousand Dollars ($5,000.00) or by imprisonment of not more than five (5) years in the custody of the Department of Corrections, or both.

[14] ¶ 11. We find that Miss.Code Ann. § 97-29-63 is not ambiguous. The statute provides four elements to this statutory crime: (1) intent-"lewd, licentious or indecent intent;" (2) act-"secretly photograph[ing], film[ing], videotap[ing], record[ing] or otherwise;" (3) lack of consent-"without the permission of [the victim];" and (4) protected location-"when such a person is located in a place where a person would intend to be in a state of undress and have a reasonable expectation of privacy, including, but not limited to, private dwellings or any facility, public or private, used as a restroom, bathroom, shower room, tanning booth, locker room, fitting room, dressing room or bedroom." *See* Miss.Code Ann. § 97-29-63 (Rev.2006).

[15] ¶ 12. Regarding the first element, lewd intent, and the third element, lack of consent, Gilmer does not raise insufficiency of evidence of the State's proof on appeal. Gilmer's first assertion of insufficiency concerns the second element, the act of "secretly" recording the victim. Gilmer contends that the evidence did not sufficiently show he "secretly" recorded Clayton based on the fact that Clayton

was aware that Gilmer was recording her on each occasion for which he was convicted.

¶ 13. As we are applying the plain meaning of this statute, we will look to Webster's Dictionary. "Secretly" is defined as "in secret," "in secrecy," and "not openly." *Webster's Third New International Dictionary unabridged* 2052 (1986). Of numerous definitions for "secret," two pertinent ones are "done or undertaken with evident purpose of concealment" and "constructed so as to elude observation or detection." *Id.*

¶ 14. The undisputed facts are that Gilmer recorded Clayton starting around 9:00 at night, sitting inside his vehicle, the interior of which was dark, about 87 feet away from Clayton's apartment, using a camera and its zoom feature and carrying in his vehicle two sets of binoculars. The time of day, dark location, distance from Clayton's apartment and equipment for producing close-up recordings from such a distance clearly indicate an attempt by Gilmer to conceal his actions and elude observation or detection. Therefore, the facts were sufficient to support a jury finding beyond a reasonable doubt that Gilmer acted "secretly" in recording Clayton.

[16] ¶ 15. Gilmer further contends that the evidence is insufficient to prove the final element, the location element-that the recording took place "where a person would intend to be in a state of undress *and* have a reasonable expectation of privacy." However, as the State asserts, Gilmer has overlooked a significant portion of the statute within the location element.

***835** ¶ 16. The entirety of the location element reads that the criminal act of recording must take place: "when such a person is located in a place where a person would intend to be in a state of undress and have a reasonable expectation of

privacy, including, but not limited to, private dwellings or any facility, public or private, used as a restroom, bathroom, shower room, tanning booth, locker room, fitting room, dressing room or bedroom." *See* Miss.Code Ann. § 97-29-63 (Rev.2006). As this is an issue of first impression, we will parse each phrase in this portion of the statute in order to promote clarity.

¶ 17. The language "when such a person is located in a place" introduces the location element and encompasses every phrase in that element which follows. *Id.* Next, qualifying a location as covered under this statute, are two descriptors: (1) "where a person would intend to be in a state of undress" and (2) "have a reasonable expectation of privacy." *Id.* This is the language which Gilmer asserts provides necessary elements which must be proven. We agree.

¶ 18. However, Gilmer fails to acknowledge that immediately following these descriptors, the statute explicitly names certain places, which fit the preceding descriptors, "including, but not limited to, private dwellings or any facility, public or private, used as a restroom, bathroom, shower room, tanning booth, locker room, fitting room, dressing room or bedroom." *Id.* It is obvious that the Legislature intended by using the language "including" to designate as a matter of law a list of places which were included in, or satisfied, the preceding descriptors.

[17] ¶ 19. Gilmer maintains that the listing of locations which satisfy the location element is redundant with regard to the preceding descriptors. However, this Court is obliged, whenever reasonable, to reach an interpretation which gives effect to all the statutory language. *Davis v. Miller,* 202 Miss. 880, 32 So.2d 871, 873 (Miss.1947). This obligation is easily achieved and in accord with a logical reading of the statute. Clearly, all locations in which a

person is protected from voyeurism under this statute were not covered by the Legislature in its list as evidenced by its language "including, but not limited to." This language suggests that the list of places was not exhaustive and that places other than those listed might also satisfy the descriptors.

[18][19] ¶ 20. Consistent with the plain language of the statute, when the prohibited recording happens in one of the explicitly listed locations, the State need not prove at trial, and this Court need not analyze on appeal, whether these places are "where a person would intend to be in a state of undress and have a reasonable expectation of privacy," as these certain places are locations deemed as a matter of law to satisfy such qualifications. However, when the prohibited recording occurs in a location other than one of those explicitly listed, the State must show at trial and this Court must determine on appeal whether the location was one "where a person would intend to be in a state of undress and have a reasonable expectation of privacy." Accordingly, the inquiry as to whether the evidence was sufficient to meet the location element, becomes whether the two descriptors are satisfied as a matter of law in that the recording happened in one of the listed locations and if not, whether the evidence was sufficient to satisfy the two descriptors. [FN1]

FN1. We take seriously our responsibility to neither enlarge nor restrict a statute. *Traylor*, 100 Miss. at 558-59, 56 So. 521. The dissent alleges that we have restricted the statute in doing away with a portion of the location element. Quite the contrary, we have parsed the requirement to give effect to all the words in the statute. The proof of location must *either* meet the two descriptors, in which case both must be proven, *or* establish that the victim was in one of the explicit locations named in the statute, which according to the structure and plain language of the statute indicate that such locations are deemed by the legislature as meeting the two

descriptors. These places are *per se* places where a person intends to be in a state of undress and has a reasonable expectation of privacy. It seems the dissent would have us discard such a list of places as meaningless and superfluous. The legislators did not choose to precede the list with potentially ambiguous language, such as "for example" but with the word "including" which indicates that the preceding word or phrase is definitely encompassed by the subsequent word or phrase. The only reading which gives effect to the plain meaning of each word and phrase in the statute is that which acknowledges that the Legislature laid out two routes by which the State can prove the location element. We simply give effect to each phrase. The dissent attempts to point out a restrictive approach by the majority, when, in fact, it is the dissent who attempts to restrict the language of the statute and disregard an entire listing of locations in the statute as superfluous.

836** ¶ 21. The places which meet the location element as a matter of law are: "*private dwellings* ***or any facility, public or private, used as a restroom, bathroom, shower room, tanning booth, locker room, fitting room, dressing room or bedroom." Miss.Code Ann. § 97-29-63 (Rev.2006) (emphasis added). The "or" indicates that there are two categories of places in the list. The first category is private dwellings. The second category of places consists of public and private facilities, a number of which are named. Without question, proof that Gilmer recorded Clayton while she was in her apartment is equivalent to proving that she was recorded while in her private dwelling.

¶ 22. The location element of Miss.Code Ann. § 97-29-63 is satisfied by proving that at the time of the criminal act, the victim was in a place which meets the two descriptors in the statute. Further, we further hold that in accordance with the plain meaning of the statute, proving that the victim was in one of the places explicitly listed in the statute when the

crime occurred is, as a matter of law, sufficient to prove that the victim was in a place which satisfies the two statutory descriptors of the protected locations. Adopting Gilmer's interpretation would, in direct contradiction of precedent, restrict the explicit language of the statute and not give effect to the legislative intent. Therefore, we give effect to the entire statute and find that, as it is undisputed that Clayton was in her private dwelling at the time Gilmer recorded her, there was sufficient evidence that the location element was met. Thus, Gilmer's first assertion of error is without merit, and the trial court did not err in denying Gilmer's motion for directed verdict, JNOV or a new trial.

II. Whether the Trial Court Committed Reversible Error in Overruling Gilmer's Motion to Quash the Indictment for Failure to State an Essential Element of the Offense.

¶ 23. The second assertion of error Gilmer raised is that the indictment is defective because it fails to include an essential statutory element.

[20][21] ¶ 24. The question of whether an indictment is fatally defective is an issue of law, and, therefore, is reviewed de novo by this Court. *Peterson v. State*, 671 So.2d 647, 652 (Miss.1996). An indictment must contain (1) the essential elements of the offense charged, (2) sufficient facts to fairly inform the defendant of the charge against which he must defend, and (3) sufficient facts to enable him to plead double jeopardy in the event of a future prosecution*837 for the same offense. *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590 (1974); *Love v. State*, 52 So.2d 470, 472 (Miss.1951). Gilmer does not raise error with the sufficiency of the facts but with the completeness of the elements.

[22] ¶ 25. For each count, the indictment read that Gilmer: did willfully, unlawfully and feloniously and with lewd,

licentious, or indecent intent, secretly videotape and record the image of person, Debra Clayton, without her permission, while Debra Clayton was inside of her apartment having a reasonable expectation of privacy, in the City of Ridgeland, Madison County, Mississippi, in violation of Mississippi Code Annotated § 97-29-63 (1972), as amended.

¶ 26. Gilmer contends that the location element is incomplete in that it is lacking the statutory language "when such a person is located in a place where a person would intend to be in a state of undress." *See* Miss.Code Ann. § 97-29-63 (Rev.2006). We reject that argument as this Court has held:

It is not essential, in an indictment for a statutory crime, that the exact descriptive language of the statute be used. Equivalent words of substantially the same meaning as those of the statute may be substituted. Where the language used in the indictment is sufficiently specific to give notice of the act made unlawful, and exclusive enough to prevents its application to other acts, it is sufficient.

Price v. State, 898 So.2d 641, 654 (Miss.2005). As mentioned in the first issue, the statute has defined a private dwelling as a place where a person would intend to be in a state of undress. Clayton being "inside of her apartment," as stated in the indictment, is equivalent to her being inside her private dwelling. Thus, as the statute assigns to the language in the indictment the same meaning as the language the absence of which Gilmer asserts is fatal, the indictment language is sufficient. Gilmer's second assertion of error is without merit.**III. The Statute Is Unconstitutionally Vague and Overbroad on its Face and as Applied to Gilmer.**

[23] ¶ 27. This Court reviews the constitutionality of Mississippi statutes *de novo. Thoms v. Thoms,* 928 So.2d 852, 855 (Miss.2006).

¶ 28. Gilmer argues that Miss.Code Ann. § 97-29-63 is overbroad. He cites *State v. Stevenson*, 236 Wis.2d 86, 613 N.W.2d 90 (2000), to support his assertion that the Mississippi statute has a chilling effect on protected speech in that law enforcement, private investigators and reporters could be subjected to prosecution for legitimate activities such as filming a fully clothed person through an open window.

[24][25] ¶ 29. First, it should be noted that while it is raised as an assertion of error, Gilmer neither addressed nor briefed vagueness. Thus, that argument is procedurally barred. *Misso v. Oliver*, 666 So.2d 1366, 1369-70 (Miss.1996) (declining to address issues raised by the appellant when he did not comply with his affirmative duty to specifically address the issue and provide authoritative support for its position). Further, *Stevenson* addresses the overbreadth of the Wisconsin voyeurism statute, which is distinguishable from the Mississippi statute. The Wisconsin statute provides in pertinent part:

(2) Whoever does any of the following is guilty of a Class E felony:
(a) Takes a photograph or makes a motion picture, videotape or other visual representation or reproduction that depicts*838 nudity without the knowledge or consent of the person who is depicted nude, if the person knows or has reason to know that the person who is depicted nude does not know of and consent to the taking or making of the photograph, motion picture, videotape or other visual representation or reproduction.

Wis. Stat. § 944.205(2)(a).

In finding the statute overbroad, the Wisconsin Supreme Court stated:

[t]he statute not only properly prohibits Stevenson's surreptitious videotaping of his former girlfriend in the nude, but also improperly prohibits all visual expression of nudity without explicit consent, including political satire and newsworthy images.

Wisconsin Stat. § 944.205(2)(a) does not limit its reach to original depictions of nudity but rather overreaches to all reproductions. It chills the ability to include copies of masterpieces like Michaelangelo's "David" in a book devoted to famous sculptures and also prevents the dissemination of materials that may portray nudity for health or educational purposes.

Stevenson, 613 N.W.2d at 95. Gilmer's reliance on *Stevenson* is misplaced because the grounds for the chilling effect of the Wisconsin statute are absent in the Mississippi statute. As the State asserts, the Wisconsin statute lacks a lewd-intent requirement and a victim-location requirement. The lewd-intent element of the Mississippi statute prevents an overbroad reach to legitimate recording of persons for legitimate purposes, such as political satire, newsworthy images, law enforcement surveillance, and socially valued artistic productions. Beyond the simple act of recording a person without his or her consent, the State must prove that the defendant recorded the victim with a lewd intent and that the defendant did so in a place which constitutes a protected location pursuant to the statute. The combination of the lewd-intent requirement and the victim-location requirement makes the Mississippi statute a much more narrowly tailored statute. In fact, since conviction under Miss.Code Ann. § 97-29-63 requires a showing that the defendant acted with a lewd intent, recordings which meet all the other statutory elements-secretly recording, lack of consent, and in a protected location, such recordings which might be properly undertaken by a police officer-are put in no danger by this

statute.[FN2] *839 Therefore, Gilmer's assertion as to the overbreadth of the Mississippi statute in that legitimate activities will be implicated is without merit.

FN2. In order to prevent potential confusion resulting from the dissent's allegations of a due process violation in that we have removed the burden of proving lewd intent, this Court reiterates the requirement that the State must prove *each* element of this statutory offense in order to obtain a valid conviction. As for what is sufficient to prove this element, since Gilmer did not raise an issue of sufficiency of evidence of lewd intent, that issue is not before this Court, and therefore, we will not engage in an examination of the sufficiency of such evidence. *See Excello Feed Milling Co. v. United States Fidelity & Guaranty Co.*, 145 Miss. 599, 608, 111 So. 94 (1927) ("a ground for the reversal of a judgment is waived when the brief of the appellant contains no reference thereto was expressly decided in *N.M. & C.R.R. Co. v. State*, 110 Miss. 290, 70 So. 355"); *McCaleb v. McCaleb*, 110 Miss. 486, 70 So. 563 (1915), modified, 113 Miss. 337, 74 So. 275 (1917) (a question, not raised either by assignment of error or mentioned in brief of the appellant, need not be considered on appeal).

We do note, however, that the lewd-intent element clearly distinguishes the police officers, who secretly recorded Gilmer without his consent for an evidentiary purpose, from Gilmer, against whom evidence was presented of his recording Clayton without her consent in a manner to conceal his activities, zooming in on Clayton's crotch and chest areas, engaging in back-and-forth hand motions behind the wheel during recording, and stating on the night of his arrest, "Ain't it funny what p**** will make you do?" As such, the dissent can rest assured that a per se violation of this statute is not established when a television reporter simply records persons in the locker room or when a private investigator simply records night-time adulterous activities.

The dissent's conclusion that people all over the state are in danger of committing a felony simply because they are using a recording device is unfounded. The only person in danger of a conviction under this statute is one for whom each element, including lewd intent, can be proven beyond a reasonable doubt.

IV. The Trial Court Erred in Overruling Gilmer's Objection to the Instructions Which Failed to Require That the Jury Find That Clayton Was in a Place Where a Person Would Intend to Be in a State of Undress and Have a Reasonable Expectation of Privacy.

V. This Court Should Reverse Gilmer's Conviction Because the Jury Was Not Told That it Had to Find That Clayton's Expectation of Privacy, If Any, Had to Be Reasonable under the Circumstances.

¶ 30. Gilmer's fourth and fifth designations of error concern alleged errors in the jury instructions and thus, will be addressed simultaneously. His fourth assignment of error asserts that the instruction incorrectly informed the jury that Gilmer could be found guilty, with regard to the victim-location element, upon the mere finding that Clayton was in her private dwelling at the time of the alleged criminal activity. Gilmer contends that this instruction is incorrect because it assumes that a private dwelling is a place where a person would intend to be in a state of undress and have a reasonable expectation of privacy. Gilmer's fifth assertion of error is that the jury instructions are defective since they do not inform the jury that it must find that Clayton had a subjective expectation of privacy as well as that her expectation must have been reasonable.

¶ 31. The jury instruction for each of the ten counts read:
If you find from the evidence in this case, beyond a reasonable doubt, that the Defendant Eddie Gilmer, did

willfully, unlawfully, knowingly, and feloniously, in Madison County, Mississippi,

1. on or about the day of ____, 2003.[FN3]

FN3. The ten counts with which Gilmer was charged occurred during April and May of 2003.

2. with lewd, licentious or indecent intent,
3. secretly photograph, film, videotape, record, or otherwise reproduce the image of Debra Clayton without the permission of the said Debra Clayton,
4. when Debra Clayton was located in her private dwelling where a person would intend to be in a state of undress and have a reasonable expectation of privacy; then you shall find the Defendant, Eddie Gilmer, guilty as charged in Count I of the indictment.
If the State has failed to prove any one or more of the above listed elements, beyond a reasonable doubt, then you shall find the Defendant not guilty.

¶ 32. Each assertion fails for the same reason. As aforementioned, since the showing that the victim was "in her private dwelling" alone is sufficient to meet the victim location element, the finding beyond a reasonable doubt that the victim was "in her private dwelling" is alone a sufficient jury instruction with regard to that element of the statutory crime. Therefore, both of these errors are without merit.

***840 CONCLUSION**

¶ 33. In order to obtain a conviction under Miss.Code Ann. § 97-29-63 (Rev.2006), four elements must be proven: (1) *mens rea*-lewd intent; (2) lack of consent; and (3) *actus reus*-secretly recording (4) in a protected location. This Court holds that the fact that a victim was in her private dwelling when the defendant committed the *actus reus* is

sufficient, according to the plain language of the statute, to satisfy the protected-location element. Accordingly, each of Gilmer's assertions of error are without merit, as each is based on a premise contrary to that holding. Therefore, we affirm the judgment of the Circuit Court of Madison County.

¶ 34. COUNT VI: CONVICTION OF PHOTOGRAPHING A PERSON IN PRIVATE WITHOUT PERMISSION AND SENTENCE OF FIVE (5) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AFFIRMED. COUNT VII: CONVICTION OF PHOTOGRAPHING A PERSON IN PRIVATE WITHOUT PERMISSION AND SENTENCE OF FIVE (5) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AFFIRMED. COUNT VIII: CONVICTION OF PHOTOGRAPHING A PERSON IN PRIVATE WITHOUT PERMISSION AND SENTENCE OF FIVE (5) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AFFIRMED. COUNT IX: CONVICTION OF PHOTOGRAPHING A PERSON IN PRIVATE WITHOUT PERMISSION AND SENTENCE OF FIVE (5) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AFFIRMED. COUNT X: CONVICTION OF PHOTOGRAPHING A PERSON IN PRIVATE WITHOUT PERMISSION AND SENTENCE OF FIVE (5) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AFFIRMED. THE SENTENCE IN COUNTS VI, VII, VIII, IX AND X SHALL RUN CONSECUTIVELY WITH EACH OTHER. PURSUANT TO SECTION 47-7-33 or SECTION 47-7-34 MISSISSIPPI CODE OF 1972, THE EXECUTION OF THE LAST FIVE (5) YEARS OF THE SENTENCES IMPOSED IN COUNT IX AND COUNT X ARE STAYED AND THAT PORTION OF THE

SENTENCE(S) IS/ARE SUSPENDED AND THE APPELLANT SHALL BE RELEASED ON SUPERVISED PROBATION FOR A TERM OF FIVE (5) YEARS WITH CONDITIONS UNDER THE SUPERVISION OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS.

WALLER, P.J., EASLEY, CARLSON AND RANDOLPH, JJ., CONCUR. DIAZ, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY GRAVES AND DICKINSON, JJ. DICKINSON, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY DIAZ, P.J. AND GRAVES, JJ.

DIAZ, Presiding Justice, dissenting.

¶ 35. Because the majority incorrectly defines the elements of video voyeurism, in violation of fundamental principles of due process, I must respectfully dissent.

¶ 36. As this Court recently noted, "[i]t is bedrock law in Mississippi that criminal statutes are to be strictly construed against the State and liberally in favor of the accused." *Coleman v. State*, 947 So.2d 878, 881 (Miss.2006) (citing *McLamb v. State*, 456 So.2d 743, 745 (Miss.1984)). Chief Justice John Marshall wrote that this ancient rule of statutory interpretation "is founded on the tenderness of the law ***841** for the rights of individuals: and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." *U.S. v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95, 5 L.Ed. 37, 42 (1820). Judicial constructions not construing statutes in favor of the offender violate fundamental principles of due process. *Duke v. U. of Tex.*, 663 F.2d 522, 526 (5th Cir.1981), 527 (citing *Dunn v. U.S.*, 442 U.S. 100, 112, 99 S.Ct. 2190, 2197, 60 L.Ed.2d 743 (1979); *Marks v. U.S.*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977); *Rabe v. Washington*, 405 U.S. 313, 92

S.Ct. 993, 31 L.Ed.2d 258 (1972); *Bouie v. City of Columbia,* 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964)). Finally, any "[a]mbiguities concerning the ambit of criminal statutes should be resolved in favor of lenity." *Id.* (citing *Busic v. U.S.,* 446 U.S. 398, 406, 100 S.Ct. 1747, 1753, 64 L.Ed.2d 381 (1980); *Dunn,* 442 U.S. at 112, 99 S.Ct. 2190; *Mourning v. Family Publications Service, Inc.,* 411 U.S. 356, 375, 93 S.Ct. 1652, 1663, 36 L.Ed.2d 318 (1973); *U.S. v. Campos-Serrano,* 404 U.S. 293, 297, 92 S.Ct. 471, 474, 30 L.Ed.2d 457 (1971); *McBoyle v. U.S.,* 283 U.S. 25, 27, 51 S.Ct. 340, 341, 75 L.Ed. 816 (1931); *U.S. v. Scrimgeour,* 636 F.2d 1019, 1022 (5th Cir.1981); *Tenneco Oil Co. v. Padre Drilling Co.,* 453 S.W.2d 814 (Tex.1970)).

¶ 37. Accordingly, the State was required to prove the following elements: (1) "lewd, licentious or indecent intent;" (2) "secretly photograph[ing], film [ing], videotap[ing], record[ing] or otherwise reproduc[ing] the image of another person;" (3) without their permission; (4) when the other person "is located in a place ***where a person would intend to be in a state of undress;*** " and (5) ***where that person would "have a reasonable expectation of privacy.***" Miss Code Ann. § 97-29-63 (Rev.2006) (emphasis supplied).

¶ 38. Under the majority's interpretation, the State is able to meet the fourth and fifth elements merely by proving the person was located in a private dwelling. This is a clear violation of our rules of statutory construction, and results in a violation of due process. *Duke v. U. of Tex.,* 663 F.2d 522, 526 (5th Cir.1981). The opinion neither addresses the age-old rule of construction regarding criminal statutes nor does it explain how its interpretation of the statute does not violate due process. Instead, the opinion relies on *Davis v. Miller,* 202 Miss. 880, 890, 32 So.2d 871, 873 (Miss.1947) in support of its liberal interpretation in favor of the state.

Davis held that courts may not construe a statute such that a portion of it becomes meaningless. *Id.* (citing 50 Am.Jur., Statutes, Sec. 358, 361-64). This proposition actually undermines the majority's conclusion, for under its interpretation, the undress and privacy portions of the statute become meaningless. *Id.*

¶ 39. The State presented no evidence that Clayton was "located in a place where a person would intend to be in a state of undress." This element cannot be met by the mere fact that she was inside her apartment. At all times, Clayton was fully clothed, seated in front of an open door and facing a public parking lot. Consistent with her testimony, reasonable persons would not intend to be in a state of undress while sitting in front of an open door. She repeatedly testified that she never intended to be undressed with the blinds or door open:

Q: At anytime when the defendant was present, were you disrobed?
A: No.
Q: Were there occasions, however, in your home when you were disrobed?
A: As long as my window was shut and my blinds were pulled.
***842** ....
Q: Would it be fair to say that you generally don't intend to be in a state of undress in your living room or den in front of a plate glass window with it open, do you?
A: Not open.
Q: Or with the blinds open. Would you agree with that?
A: Yes, I would.

¶ 40. Given that the State failed to provide sufficient evidence of an essential element of the crime, the trial court erred in refusing to grant a directed verdict.

¶ 41. The majority's broad interpretation of the crime has alarming implications for all persons who use a video camera or any other recording device. The Legislature was clear in its intent: This law was to protect persons from intrusive and invasive private recording-a "Peeping Tom" law for this ever-more digital world. Yet under the majority's interpretation of the statute, virtually any use of a recording device could prove to be a felony. Under their reasoning, many persons who utilize recording devices in otherwise legal employment might be criminals. Beware then to the television reporter who covers a high school football match and conducts interviews in the team's locker room. Beware also to the private investigator who is lawfully paid by a spouse to record the night-time activities of a straying mate. Under the majority's view of the law, any "lewd intent" might be established if the camera happens to zoom in on a sensitive area of the person's body.

¶ 42. The majority's elimination of two critical elements from the crime of video voyeurism distorts legislative intent and violates centuries-old, fundamental principles of due process. Because the State has failed to provide sufficient evidence of all the elements of the crime, I would reverse Gilmer's conviction.

GRAVES AND DICKINSON, JJ., JOIN THIS OPINION.

DICKINSON, Justice, dissenting.

¶ 43. To be clear, Gilmer did not video someone who believed she was enjoying a moment of privacy where she could not be seen or filmed. Gilmer is charged with video taping Clayton at a time when she was fully clothed and sitting in a place where she freely admits that people outside in the parking lot could see her. While Gilmer's conduct may be bizarre, distasteful, and perhaps even civilly actionable, it does not constitute voyeurism. Voyeurism is

not taking pictures of a person who is aware that the public may be looking. What an absurdity for the law to allow one to stand and look with impunity at a person who knows they are being looked at, but the moment a picture is taken or a video is made, the looker becomes a voyeur, that is to say, a criminal.

¶ 44. Debra Clayton freely admits she was aware that anyone in the parking lot of her apartment complex could easily see her while she was sitting in front of her balcony door. Thus, from the State's (and the majority's) point of view, even though Clayton knew that Gilmer (and others) might be looking at her, they could not take a picture of what they saw without violating Mississippi Code Annotated Section 97-29-63 (the "Voyeur Statute").

¶ 45. According to its very language, the Voyeur Statute is violated only when the person photographed or videotaped is in a place where that person has a reasonable expectation of privacy. By Clayton's own admission, there was no expectation of privacy where the video was made, and, therefore, the Voyeur Statute was not violated. For this reason, and for those stated*843 by Justice Diaz in his dissent, I respectfully dissent.

DIAZ, P.J., AND GRAVES, J., JOIN THIS OPINION.

APPENDIX B

IN THE CIRCUIT COURT
OF MADISON COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI
VS. CAUSE NO. 2003-0271, COUNT VI, COUNT VII, COUNT III, COUNT IX AND COUNT X
EDDIE GILMER

FILED 8/13/2004

FINAL JUDGMENT OF CONVICTION

THIS CAUSE having come on for trial on August 10, 2004, and continuing through August 12, 2004, during the August term of this Court, and the Defendant, Eddie Gilmer, being represented by Mike Ward, Esquire, and Ben Conner, Esquire, and the State of Mississippi being represented by Tom Kesler and Scott Rogillio, Assistant District Attorneys, and both parties having announced ready for trial, issue hereby being joined, a jury composed of good and lawful citizens of Madison County, Mississippi being duly qualified for jurors in this cause, having been selected by the parties to serve as jurors in this cause, said jury being empaneled according to law, and the Court and jury having then heard evidence and argument of counsel by both parties, and the Court then having instructed the jury according to law, and the jury having retired to consider its verdicts;

WHEREUPON, the jury having in due course rendered and announced its verdicts unto the Court as follows:

"We, the jury, find the Defendant, Eddie Gilmer, guilty of photographing a person in privacy without permission as charged in Count VI of the indictment."

"We, the jury, find the Defendant, Eddie Gilmer, guilty of photographing a person in privacy without permission as charged in Count VII of the indictment."

"We, the jury, find the Defendant, Eddie Gilmer, guilty of photographing a person in privacy without permission as charged in Count VIII of the indictment."

"We, the jury, find the Defendant, Eddie Gilmer, guilty of photographing a person in privacy without permission as charged in Count IX of the indictment."

"We, the jury, find the Defendant, Eddie Gilmer, guilty of photographing a person in privacy without permission as charged in Count X of the indictment."

IT IS, THEREFORE, ORDERED AND ADJUDGED, that, upon the verdicts of the jury, the Defendant, Eddie Gilmer, is guilty of the crimes of photographing a person in privacy without permission as charged in Count VI, Count VII, Count VIII, Count IX and Count X of the Indictment in this cause and sentencing is set for Wednesday, September 15, 2004.

SO ORDERED AND ADJUDGED this the 12th day of August, 2004.

s/*Samac S. Richardson*
CIRCUIT JUDGE

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

NO. 07-183

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2007

EDDIE GILMER
Petitioner

versus

STATE OF MISSISSIPPI,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER THE MISSISSIPPI SUPREME COURT INTERPRETATION OF A CRIMINAL STATUTE IS CONSTITUTIONALLY VAGUE AND OVERBROAD.

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EDDIE GILMER
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STATE OF MISSISSIPPI,
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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

This matter is before the Court on the petition of Eddie Gilmer for a Writ of Certiorari to the Supreme Court of Mississippi wherein the court below, on direct appeal of a jury verdict, affirmed Gilmer's convictions and sentences for five counts of video voyeurism.

OPINION BELOW

The opinion of the Mississippi Supreme Court affirming the convictions and sentences for video voyeurism is reported as *State v. Gilmer*, 955 So. 2d 829 (Miss. 2007). The opinion may be found as "Appendix A" of Petitioner's request for writ of certiorari.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to the authority of 28 U.S.C. § 1257 claiming the statute as applied is overbroad and has a chilling effect on the First Amendment right to free expression.

CONSTITUTIONAL PROVISION INVOLVED

Petitioner has identified Constitutional provisions as set forth in the Brief of Petitioner. U.S. Const. Amend. I & XIV.

STATEMENT OF THE CASE

The course of proceedings and facts are accurately reflected in the Brief of Petitioner as taken from the opinion of the court below. (Br. of Pet., App. A, *State v. Gilmer*, 955 So. 2d 829, (¶¶2-4)(Miss. 2007)).

SUMMARY OF THE ARGUMENT

MISSISSIPPI SUPREME COURT STATUTORY CONSTRUCTION OF A CRIMINAL STATUTE DOES NOT HAVE A CHILLING EFFECT ON LEGITIMATE FIRST AMENDMENT EXPRESSION.

REASONS TO DENY THE WRIT

MISSISSIPPI SUPREME COURT STATUTORY CONSTRUCTION OF A CRIMINAL STATUTE DOES NOT HAVE A CHILLING EFFECT ON LEGITIMATE FIRST AMENDMENT EXPRESSION.

Petitioner adopts and presents as its petition for writ of certiorari the dissenting opinion of the Mississippi State Supreme Court opinion. (Pet. Br. footnote 1).

The statutory provision under which petitioner stands convicted is:

> **Miss. Code Ann. § 97-29-63. Photographing, taping, or filming person in violation of expectation of privacy.**
>
> Any person who with lewd, licentious or indecent intent secretly photographs, films, videotapes, records or otherwise reproduces the image of another person without the permission of such person when such a person is located in a place where a person would intend to be in a state of undress and have a reasonable expectation of privacy, including, but not limited to, private dwellings or any facility, public or private, used as a restroom, bathroom, shower room, tanning booth, locker room, fitting room, dressing room or bedroom shall be guilty of a felony and upon conviction shall be punished by

> a fine of Five Thousand Dollars ($5,000.00) or by imprisonment of not more than five (5) years in the custody of the Department of Corrections, or both.

The opinion of the Mississippi Supreme Court was the first time the State's highest court interpreted this statutory provision. *Gilmer*, ¶1.

The Mississippi Supreme Court specifically addressed the issues of vagueness and First Amendment freedom of expression as raised in the dissent – and now presented as the reasons to grant certiorari.

> FN1. We take seriously our responsibility to neither enlarge nor restrict a statute. Traylor, 100 Miss. at 558-59, 56 So. 521. The dissent alleges that we have restricted the statute in doing away with a portion of the location element. Quite the contrary, we have parsed the requirement to give effect to all the words in the statute. The proof of location must either meet the two descriptors, in which case both must be proven, or establish that the victim was in one of the explicit locations named in the statute, which according to the structure and plain language of the statute indicate that such locations are deemed by the legislature as meeting the two descriptors. These places are per se places where a person intends

> to be in a state of undress and has a reasonable expectation of privacy. It seems the dissent would have us discard such a list of places as meaningless and superfluous. The legislators did not choose to precede the list with potentially ambiguous language, such as "for example" but with the word "including" which indicates that the preceding word or phrase is definitely encompassed by the subsequent word or phrase. The only reading which gives effect to the plain meaning of each word and phrase in the statute is that which acknowledges that the Legislature laid out two routes by which the State can prove the location element. We simply give effect to each phrase. The dissent attempts to point out a restrictive approach by the majority, when, in fact, it is the dissent who attempts to restrict the language of the statute and disregard an entire listing of locations in the statute as superfluous.
>
> *Gilmer v. State,* 955 So.2d 829 (Miss. 2007)(Footnote 1).

Additionally, and specifically the Mississippi Supreme Court specifically addressed the 'due process' concerns, as well as the First Amendment concerns. *Gilmer*, fn.2.

> FN2. In order to prevent potential confusion resulting from the dissent's allegations of a due process violation in that we have removed the burden of proving lewd intent, this Court reiterates the requirement that the State must

prove each element of this statutory offense in order to obtain a valid conviction. As for what is sufficient to prove this element, since Gilmer did not raise an issue of sufficiency of evidence of lewd intent, that issue is not before this Court, and therefore, we will not engage in an examination of the sufficiency of such evidence. See Excello Feed Milling Co. v. United States Fidelity & Guaranty Co., 145 Miss. 599, 608, 111 So. 94 (1927) ("a ground for the reversal of a judgment is waived when the brief of the appellant contains no reference thereto was expressly decided in N.M. & C.R.R. Co. v. State, 110 Miss. 290, 70 So. 355"); McCaleb v. McCaleb, 110 Miss. 486, 70 So. 563 (1915), modified, 113 Miss. 337, 74 So. 275 (1917) (a question, not raised either by assignment of error or mentioned in brief of the appellant, need not be considered on appeal).

We do note, however, that the lewd-intent element clearly distinguishes the police officers, who secretly recorded Gilmer without his consent for an evidentiary purpose, from *Gilmer, against whom evidence was presented of his recording Clayton without her consent in a manner to conceal his activities, zooming in on Clayton's crotch and chest areas, engaging in back-and-forth hand motions behind the wheel during recording, and stating on the night of his arrest, "Ain't it funny what p**** will make you do?" As such, the dissent can rest assured that a per se violation of this statute is not established when a television reporter simply records persons in the locker*

> *room or when a private investigator simply records night-time adulterous activities. The dissent's conclusion that people all over the state are in danger of committing a felony simply because they are using a recording device is unfounded. The only person in danger of a conviction under this statute is one for whom each element, including lewd intent, can be proven beyond a reasonable doubt.*
>
> *Gilmer v. State,* 955 So.2d 829 (Miss. 2007)(Footnote 2, italics added).

Petitioner now seeks to have this court review and interpret the Mississippi's Video Voyeurism. As this Court has oft held:

> When a state statute has been construed to forbid identifiable conduct so that 'interpretation by (the state court) puts these words in the statute as definitely as if it had been so amended by the legislature,' claims of impermissible vagueness must be judged in that light. Winters v. New York, 333 U.S. 507, 514, 68 S.Ct. 665, 669, 92 L.Ed. 840 (1948). This has been the normal view in this Court. Fox v. Washington, 236 U.S. 273, 277, 35 S.Ct. 383, 384, 59 L.Ed. 573 (1915); Beauharnais v. Illinois, 343 U.S. 250, 253, 72 S.Ct. 725, 728, 96 L.Ed. 919 (1952); Mishkin v. New York, 383 U.S. 502, 506, 86 S.Ct. 958, 962, 16 L.Ed.2d 56 (1966).

Wainwright v. Stone, 414 U.S. 21, 23 (1973).

It is the position of the State of Mississippi that the statute and the holding of the Mississippi Supreme Court clearly define and limit the conduct that is considered criminal. All the while considering and addressing the concerns of Constitutional due process and freedom of expression.

Additionally, the Mississippi Supreme Court correctly holds that the elements of the offense must *all* be present to support a conviction. Thus, overcoming the claim the statute would be applied to individuals that innocently might photograph someone.

Moreover, there is really no argument presented (other than that raised in the dissenting opinion) of how it is vague, ambiguous or overbroad. What petitioner does argue is the potential applicability of our criminal statute against television sports cameramen, or private investigators. (Pet.Br. Pp.6-7).

> The traditional rule is that a person to whom a statute may constitutionally be applied may not

> challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.
>
> *New York v. Ferber,* 458 U.S. 747, 767 (1982).

It is also worth noting that Petitioner does not once claim *his* conduct was not criminal. Petitioner asserts the statute is vague or overbroad; the woman knew he was filming her; or, that others might be prosecuted. Such contentions are not legally sufficient to overcome the presumption that the Mississippi Supreme Court correctly interpreted the statute to be within Constitutional limits.

In reviewing this Courts holding in *City of San Diego, Cal. v. Roe*, 543 U.S. 77 (2004), it is arguable that petitioner's conduct (County constable filming a woman while masturbating in official county car) is *not* protected as free speech or freedom of expression.

Because petitioner has failed to present any cognizable claim the petition for writ of certiorari should be denied.

CONCLUSION

For the above and foregoing reasons the State of Mississippi asks this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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